SEE CONCURRING OPINION

Filed 1/14/16 P. v. Miller CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MAX MELBY MILLER, Defendant and Appellant.	H040879 (Santa Clara County Super. Ct. No. C1350511)

Defendant Max Melby Miller was granted probation after pleading no contest to unlawful possession of methamphetamine while armed with a loaded handgun. (Health & Saf. Code, § 11370.1.) On appeal, he seeks further review of his suppression motion and he challenges three conditions of probation, one prohibiting possession of deadly or dangerous weapons, another prohibiting possession or consumption of alcohol and controlled substances, and a third ordering him to pay a crime lab fee of $50 plus penalty assessments.

The Attorney General concedes the crime lab fee and related penalty assessments are inapplicable. We will modify the probation condition prohibiting weapon possession and strike the crime lab fee and associated assessments and will affirm the judgment as modified.

I. TRIAL COURT PROCEEDINGS

A. SUPPRESSION HEARING

After a preliminary hearing, defendant was held to answer to unlawful possession of methamphetamine while armed with a loaded handgun (count 1; Health & Saf. Code, § 11370.1) and the misdemeanors of carrying a concealed handgun (count 2; Pen. Code, § 25400, subd. (a)(2)), carrying a loaded handgun (count 3; Pen. Code, § 25850, subd. (a)), and carrying paraphernalia for smoking a controlled substance (count 4; Health & Saf. Code, § 11364.1). The charges were restated in an information.

Two months after the preliminary hearing, defendant moved to suppress the products of an illegal search and seizure. In opposition to the motion, the prosecutor called one witness, Santa Clara Police Sergeant Norm Henry, who testified as follows.

On December 22, 2012, Sergeant Henry was on patrol when he responded to a radio call around 1:14 a.m. about four people possibly breaking into cars or dealing drugs near an apartment complex in Santa Clara. The report described the people as two males in black clothing, one male in white clothing, and a female in red pants, who were associated with two sport utility vehicles (SUVs), one green and the other white. The report did not describe their heights, weights, or races and did not mention a bicycle.

Henry had "worked that particular beat for many years … on graveyard shift" as a patrol officer and knew from his experience that auto burglaries frequently occurred in that area and that auto burglars "often travel from apartment complex to apartment complex." Because the original report was made 15 minutes before the radio dispatch and there were no radio reports of new developments, Henry parked on the street outside the complex around 1:20 a.m. and walked down the driveway of an apartment complex across the street from the apartments where the report originated.

When Henry was about 200 feet from the street in the middle of the driveway, he saw someone on an unlit bicycle wearing dark clothing and a dark knit cap riding toward him at an unsafe speed, considering the road was wet from a recent rain. Henry thought

it possible that the rider was fleeing a crime. The rider matched the general description of two of the suspicious people.

In Henry's experience, a reporting party provides only a snapshot of what they see. Associating someone with a car could mean either that it belonged to the person or that it was being targeted for a burglary. It is common for auto burglars at night to use bicycles so they can ride places a patrol car cannot follow. Henry did not necessarily expect to see all four people described in the report because they could have split up after other officers arrived.

When the bicycle rider was about 50 feet away, Henry illuminated the rider with his flashlight and told the rider to stop. The rider hit the brakes and slid to a stop on the ground within Henry's reach. Henry grabbed the rider's arm to keep him from running off. It was defendant, who fit the report's description of the males in black clothing. In Henry's experience, it is common for auto burglars at night to wear dark clothing to avoid detection.

Henry told defendant he was investigating car break-ins. Defendant said he lived in the area and his identification in his wallet would confirm it. He was very cooperative. Henry did not want to retrieve defendant's identification without another officer present, so he called for backup. Defendant was four inches taller than Henry, who knew that auto burglars often carry knives or improvised weapons such as screwdrivers. Henry could not tell whether defendant was carrying a weapon because defendant's jacket was bulky.

When another officer arrived, Henry grabbed defendant's hands and said he was going to patsearch him for weapons for officer safety. Defendant said he was carrying a .25 gun in his right front jacket pocket. Henry retrieved the gun and handed it to a third officer. The gun was in a purple Crown Royal bag. Henry asked if defendant had a permit to carry a concealed weapon and defendant said " '[n]o.' " Henry placed defendant under arrest and handcuffed him.

A search of the weapon revealed it was loaded with six rounds in the gun's magazine and none in the chamber. In defendant's left jacket pocket, Henry found a glass methamphetamine pipe and, in a baggie in a container, a white crystal substance that appeared to Henry to be methamphetamine.

The trial court denied defendant's suppression motion, stating "it was a very reasonable inference on [Sergeant's Henry's] part that persons that may be engaged in either drug activity or casing of cars move and that—and that it was appropriate for him to be in a location not exactly where the call was." The court found that when Henry saw defendant bearing down on him at a high rate of speed on an unlit bicycle, it was reasonable to conclude, " 'This is a person fleeing or is a person going to hit me with his bicycle.' " "And I think the detention—to see a person at 1:15 in the morning alone, at high speed, it's very reasonable [to] suspect that to be flight and to detain that person."

The court concluded that a pat search for weapons was reasonable. "[I]t's a perfectly reasonable conclusion they do carry weapons" or items that "are certainly usable as weapons" based on Henry's testimony about persons possibly casing cars. It "was absolutely appropriate, in a person that has just come skidding to a halt after speeding at him directly, to not allow that person to put their hands in their pocket to – to – to reach a potential weapon and that the concern that he may have a potential weapon is genuine." The court further concluded that probable cause to arrest arose when defendant admitted carrying an unlicensed, concealed handgun.

B. PLEA AND SENTENCING

On the day defendant's suppression motion was denied, defendant agreed to resolve five cases pending in Santa Clara County Superior Court, including this one

(docket No. C1350511).[1] In the current case, he would admit the felony charge and be placed on formal probation, with the misdemeanor charges to be dismissed at sentencing. Before taking the plea here, the court advised defendant that after a felony conviction, he would be prohibited from "owning, possessing, or having under your custody or control any firearms or ammunition for the remainder of your life." Defendant personally asked if he could appeal that, and the court advised him he could get a pardon from the Governor or a certificate of rehabilitation, but both were hard to obtain. Defendant pleaded no contest to possessing methamphetamine while armed with a loaded operable handgun. The court released defendant on his own recognizance pending sentencing.

A "waived referral" memorandum by the probation department recommended granting probation with a number of conditions and four orders that were not conditions. As relevant to this appeal, the report recommended:

"6. The defendant shall not possess or consume alcohol or illegal controlled substances or knowingly go to places where alcohol is the primary item of sale."

"9. The defendant shall not possess any item that under the law would be considered a deadly or dangerous weapon(s), during the period of Probation."

"14. A $50.00 Criminal Laboratory Analysis Fee, plus penalty assessment, be imposed pursuant to Section 11372.5 of the Health and Safety Code."

Although defendant had apparently been charged with a new offense while out of custody awaiting sentencing, the court honored the plea agreement by suspending

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[1] In docket No. C1353243, defendant pleaded no contest to driving with a revoked or suspended license (Veh. Code, § 14601.1, subd. (a)) with a prior conviction and received credit for time served. Docket No. C1364296 was dismissed on the prosecutor's motion based on defendant's plea in this case. Probation had expired in October 2013 in docket No. C1077255 involving being under the influence of a controlled substance. Defendant was scheduled for sentencing in docket No. C1242708 for misdemeanor battery of a cohabitant in violation of Penal Code sections 242–243, subdivision (e).

imposition of sentence for three years and placing defendant on formal probation. As relevant to this appeal, the court ordered: "He is not to possess or consume alcohol or illegal, controlled substances or knowingly go to places where alcohol is the primary item of sale." "He shall not possess any item that under the law would be considered a deadly or dangerous weapon during the period of probation." "$50 criminal laboratory analysis fee plus a penalty assessment[;] $150 drug program fee plus penalty assessment are ordered; that's based on the narcotics nature of the charges." The court overruled a relevance objection to the alcohol prohibitions; defendant did not object to the other quoted conditions. The court dismissed the remaining charges.

II. DISCUSSION

A. SUPPRESSION RULING

When a trial court ruling on a suppression motion has resolved evidentiary conflicts and made express and implied factual determinations about what happened, including what a peace officer did, observed, thought, and believed, those findings that are supported by substantial evidence are entitled to deferential review on appeal. (Cf. *People v. Zamudio* (2008) 43 Cal.4th 327, 342.) However, reviewing courts independently evaluate the constitutionality of what happened. Considering all the circumstances, we determine whether there was a detention, and, if so, whether the detaining officer was aware of facts making the detention objectively reasonable. (*People v. Dolly* (2007) 40 Cal.4th 458, 463 (*Dolly*).)

1. The Officer had an Objectively Reasonable Basis for Detaining Defendant

A law enforcement officer who has a reasonable suspicion based on specific and articulable facts that a person was or is involved in committing a crime may stop that person to investigate that suspicion. (*Reid v. Georgia* (1980) 448 U.S. 438, 440; *U. S. v. Hensley* (1985) 469 U.S. 221, 229; *In re James D.* (1987) 43 Cal.3d 903, 914.)

In formulating a suspicion, officers are allowed "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative

information available to them that 'might well elude an untrained person.'" (*U. S. v. Arvizu* (2002) 534 U.S. 266, 273; *People v. Hernandez* (2008) 45 Cal.4th 295, 299; cf. *U. S. v. Brignoni-Ponce* (1975) 422 U.S. 873, 885.)

There is no real dispute on appeal about whether defendant was detained when Sergeant Henry grabbed his arm. What the parties disagree about is the reasonableness of defendant's detention. In *Florida v. J. L.* (2000) 529 U.S. 266 (*J. L.*), on which defendant relies, the United States Supreme Court determined that a detention could not be justified by an anonymous tip that a young black male wearing a plaid shirt and standing at a particular bus stop was carrying a gun. While there was such a person at that location, the tip's statement of the obvious did "not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*Id.* at p. 272.) The informant "neither explained how he knew about the gun nor supplied any basis for believing he had inside information" about the individual described. (*Id.* at p. 271.)

In contrast, here the tip provided more detail and it was corroborated. The caller not only described the attire and location of four individuals, but described them as engaging in apparent criminal activity, either breaking into cars or dealing drugs. The report also explained how the caller knew about the suspicious conduct. *Dolly*, *supra*, 40 Cal.4th 458 distinguished *J. L.* and upheld a detention in part because "the tipster-victim" had not only accurately and completely described the appearance of the perpetrator of an armed assault and his location, but "provided a firsthand, contemporaneous description of the crime … ." (*Id.* at p. 468.) Contrary to defendant's argument, the report of potential auto burglary was corroborated by Sergeant Henry's experience that auto burglary was a common occurrence in the area. (*People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1619 [tip about drug-dealing was corroborated in part by location being "one of the known high-volume narcotics dealing areas of the city …"].)

Henry's experience corroborated not only the location of the criminal activity, but the time, as it occurred in the middle of the night.

The California Supreme Court found a detention justified in *People v. Harris* (1975) 15 Cal.3d 384. Two homeowners had returned home one evening to hear sounds indicating someone was inside their residence. They went to a neighbor's house, called the police, and watched as a man parked in front of their house, got out, and cleaned the car's windows. He drove away alone when the homeowners drove up behind him. (*Id.* at pp. 386–387.) They described the man to the police as a "male Caucasian, dark hair, moustache, about 5 feet 8 inches tall, about 150 pounds, wearing a light cardigan sweater and dark trousers." (*Id.* at p. 387.) Thirty minutes later and three blocks away, the police found a man matching that description walking with a male companion. The police stopped the men and questioned them. (*Ibid.*) The defendant's presence in a residential area at 11 p.m. and his "general similarity" to the homeowner's description disclosed "a reasonable possibility that [he] and his companion were involved in the burglary." (*Id.* at p. 389.)

Defendant argues that there is a significant difference at night between black and dark clothing and that he could not be apprehended unless he remained near the three other reported individuals or one of the two vehicles described. However, Sergeant Henry reasonably explained that the reported SUVs might simply have been vehicles the group was looking into at the time of the caller's observation and the group might have split up at some point to avoid detection or apprehension.

Here defendant was not merely dressed like a suspicious person near the place and time of reported suspicious activity. Sergeant Henry observed him engaging in suspicious conduct. Although there may have been an innocent explanation for defendant racing down the driveway of an apartment complex on an unlit bicycle after midnight in conditions unsafe for fast riding, Sergeant Henry was entitled to stop him to find out what it was. Even apart from the report of suspicious activity, defendant also

bore several characteristics of an auto burglar according to Sergeant Henry's experience (timing, location, attire, mode of transportation).

In *People v. Souza* (1994) 9 Cal.4th 224, an officer in a marked police car saw a male and a female standing outside a parked car around 3:00 a.m. in an area known for burglary and drug activities. (*Id.* at p. 228.) The area was almost completely dark. The male appeared to be talking to someone inside the car. When the officer trained his spotlight on the car, two people ducked down in the car's front seat and the male outside took off running. (*Ibid.*) The Supreme Court concluded, "From these circumstances—the area's reputation for criminal activity, the presence of two people near a parked car very late at night and in total darkness, and evasive conduct not only by defendant but by the two occupants of the parked car—[the officer] reasonably suspected that criminal activity was afoot." (*Id.* at p. 240.) The court found it reasonable for the officer to suspect auto burglary.

"Whether an officer's conduct was reasonable is evaluated on a case-by-case basis in light of the totality of the circumstances." (*In re Raymond C.* (2008) 45 Cal.4th 303, 307.) Although the justification for each detention depends on its unique factual context, several factors that *Souza* found to justify a detention for auto burglary appear here. Defendant was out late at night in a residential area known for auto burglaries. While Sergeant Henry did not see defendant looking into vehicles, defendant met the general description of someone who was reported to have recently done so across the street from where defendant was apprehended. Defendant also exhibited what Henry recognized as characteristics of auto burglars, and was on a bicycle that was unlit despite the darkness. Defendant did not flee after noticing Sergeant Henry, but his dangerously fast bicycle riding could reasonably appear to be an attempt to avoid apprehension by someone else. We conclude that Sergeant Henry had an objectively reasonable basis to detain defendant to ascertain whether he had a connection to the suspicious individuals observed by the reporting party some 20 minutes earlier.

2. The Patsearch was Justified

A police officer who "has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime," may patsearch the person for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 27.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Ibid.*) However, objective factors must reasonably indicate to the officer that such a search is necessary for protection. (*People v. Thomas* (1971) 16 Cal.App.3d 231, 234.)

Bulky or loose clothing can be used to conceal a weapon. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1082; *People v. Lopez* (2004) 119 Cal.App.4th 132, 137; *In re William V.* (2003) 111 Cal.App.4th 1464, 1472; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241.) This does not mean, however, that anyone wearing loose-fitting or heavy clothing is subject to a patsearch without another indication of weapon possession. (*In re H. H.* (2009) 174 Cal.App.4th 653, 660.) Defendant contends that he was cooperative, not aggressive, and there was nothing in his behavior to justify a patsearch, nor was there a bulge in his clothing suggesting a weapon.

We agree that defendant did not act like he was concealing a weapon. He did not refuse to answer questions, resist the officer, or turn away from him. (*People v. Rios* (2011) 193 Cal.App.4th 584, 599.) However, defendant's politeness after encountering Sergeant Henry did not require the officer to relax his guard and overlook suspicious circumstances. (*U. S. v. Brake* (1st Cir. 2011) 666 F.3d 800, 805.) We have already concluded that Henry was justified in detaining defendant as a possible auto burglar. Henry had learned that auto burglars often carry knives or screwdrivers that can be used as weapons. The officer's experience with auto burglars supplied a basis for a limited patsearch.

As noted in *People v. Osborne* (2009) 175 Cal.App.4th 1052, weapons have been associated with crimes such as drug trafficking and burglary. (*Id.* at pp. 1061–1062.) Perpetrators of auto burglary and auto theft typically use tools to enter or start vehicles, and those tools that can readily be used as weapons.[2] (*Id.* at p. 1061.)

We note that defendant here said he was carrying a gun in a particular pocket after Henry announced his intent to patsearch him. Although no patsearch occurred, we conclude that the officer's announced intent to patsearch defendant was justified by the officer's prior experience with auto burglars carrying weapons and his reasonable suspicion that defendant was an auto burglar. (*People v. Myles* (1975) 50 Cal.App.3d 423, 430 ["It is reasonable for an officer to believe that a burglar may be armed with weapons, or tools such as knives and screwdrivers which could be used as weapons, and that a pat-down search is necessary for the officer's safety."].)

B. PROBATION CONDITIONS

Among defendant's probation conditions are that he "not [] possess or consume alcohol or illegal, controlled substances or knowingly go to places where alcohol is the primary item of sale," and that he "not possess any item that under the law would be considered a deadly or dangerous weapon during the period of probation." Although he did not object in the trial court, defendant contends on appeal that the word "possess" in each condition must be preceded by "knowingly" to avoid unconstitutional vagueness and overbreadth. The Attorney General responds that "a knowledge requirement is inherent in the challenged conditions."

[2] We acknowledge that *Osborne* is factually distinguishable in that the officer had seen the defendant sitting inside a vehicle with screwdrivers and other tools nearby, the defendant was acting especially nervous, and the officer had learned that the defendant might be on parole. (*Osborne* at p. 1061.)

In *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*), this court recognized that "a reviewing court may examine the constitutionality of a probation condition, even if not raised in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record." (*Id.* at p. 585, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 888–889 (*Sheena K.*).) Vagueness in a probation condition, like a statute, poses two potential due process problems. It fails to provide adequate notice to probationers of what conduct to avoid and it facilitates subjective and arbitrary law enforcement. (*Sheena K.*, at p. 890.)

Sentencing courts are authorized to impose any "reasonable conditions" of probation "generally and specifically for the reformation and rehabilitation of the probationer …" (Pen. Code, § 1203.1, subd. (j))[3] without jeopardizing "[t]he safety of the public … ." (§§ 1202.7; cf. 1191.1.) "Probation conditions may be classified according to their purposes. Some reinforce the requirements of penal statutes the probationer may be especially at risk of violating. Others are intended to keep the probationer away from situations likely to lead to criminal conduct. '[E]ven if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.'" (*Rodriguez*, at p. 590, quoting *People v. Olguin* (2008) 45 Cal.4th 375, 380.)

1. Alcohol and Controlled Substances

Some courts, including this one, have found some probation conditions prohibiting possession and consumption of illegal, controlled substances and alcohol to be constitutionally clear without adding an express mental element such as knowingly. These conclusions have resulted from different rationales.

[3] Unspecified section references are to the Penal Code.

In *People v. Patel* (2011) 196 Cal.App.4th 956, which involved a probation condition prohibiting the possession and consumption of alcohol (*id.* at p. 961), the Third District resolved to prospectively construe "every probation condition proscribing a probationer's presence, possession, association, *or similar action* to require the action be undertaken knowingly." (*Id.* at p. 960; our italics.) Other district courts have continued to evaluate probation conditions on a case-by-case basis.

In *Rodriguez, supra*, 222 Cal.App.4th 578, this court reasoned that probation conditions prohibiting possession of controlled substances should be given the same interpretation as the penal statutes they are intended to enforce. "To the extent [the challenged] condition [] reinforces defendant's obligations under the California Uniform Controlled Substances Act, the same knowledge element which has been found to be implicit in those statutes is reasonably implicit in the condition. What is implicit is that possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance." (*Id.* at p. 593.)

Yet other decisions have relied on the principle, "A [trial] court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.' (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.)" (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

In *People v. Moore* (2012) 211 Cal.App.4th 1179 (*Moore*), which involved a probation condition prohibiting possession of " 'any dangerous or deadly weapons' " (*id.* at p. 1183), the Second District reasoned, "When a probationer lacks knowledge that he is in possession of a gun or weapon, his possession cannot be considered a willful violation of a probation condition." (*Id.* at pp. 1186–1187.) "Moore's primary concern is that he not be found in violation of probation absent knowing possession. … [T]his concern is illusory given that a trial court may not revoke Moore's probation unless his violation of the weapons condition is *knowing and willful*." (*Id.* at p. 1189; our

emphasis.) *Moore* concluded that "a knowledge requirement was already 'manifestly implied' " in the probation condition. (*Id.* at p. 1185.)

In a decision postdating the close of briefing in this case, the First District took a different approach in *People v. Hall* (2015) 236 Cal.App.4th 1124, a case involving probation conditions prohibiting possession or use of " 'illegal drugs, narcotics' " and possession of "any handgun, rifle, shotgun or any firearm … .' " (*Id.* at p. 1127.) The California Supreme Court has granted review in that case. (*People v. Hall*, rev. granted Sep. 9, 2015, S227193.)[4]

In *People v. Contreras* (2015) 237 Cal.App.4th 868, which involved a probation condition prohibiting possession and use of a police scanner (*id*. at p. 884), this court partially adopted the rationale of *Hall*, concluding, "a knowledge requirement is not necessary to prevent an unwitting violation of the surveillance equipment condition and it is therefore not necessary to add the word 'knowingly' to the condition as requested by the parties. But we also conclude a knowledge requirement is necessary to eliminate vagueness and overbreadth in the description of the prohibited devices and activities." (*Id.* at p. 889.)

The law on this topic is unsettled pending guidance from the California Supreme Court. We adhere to our earlier conclusions that a probation condition prohibiting "possession" of items like "illegal, controlled substances" and "alcohol" is " 'sufficiently precise for the probationer to know what is required of him, and for the court to

[4] In granting review of *Hall*, the Supreme Court stated: "This case presents the following issues: (1) Are probation conditions prohibiting defendant from: (a) 'owning, possessing or having in his custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on his person'; and (b) 'using or possessing or having in his custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription,' unconstitutionally vague? (2) Is an explicit knowledge requirement constitutionally mandated?"

determine whether the condition has been violated' … ." (*In re Sheena K., supra,* 40 Cal.4th 875, 890.)

2. Dangerous or Deadly Weapons

Applying the same reasoning results in a different conclusion regarding the probation condition providing that defendant "not possess any item that under the law would be considered a deadly or dangerous weapon during the period of probation."

While scienter may be inherent with respect to a probationer's "possession" of an item, to ensure that the probationer has " 'fair warning' " (*Sheena K., ibid.*) of what items are prohibited, we will modify the condition to state "not possess any item that you know under the law would be considered a deadly or dangerous weapon during the period of probation." (Contra, *In re R. P.* (2009) 176 Cal.App.4th 562, 568.)

3. Criminal Laboratory Analysis Fee

Defendant challenges the probation condition requiring him to pay $50 for a criminal laboratory analysis fee plus penalty assessments. Health and Safety Code section 11372.5, subdivision (a) provides in part: "Every person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense." (Health & Saf. Code, § 11372.5(a).)

Defendant points out that his admitted crime, a violation of Health and Safety Code section 11370.1, does not appear on this lengthy list. The Attorney General concedes the point.

People v. Turner (2002) 96 Cal.App.4th 1409 concluded that a "[f]ailure to impose the mandatory laboratory analysis fee constituted an unauthorized sentence" that was correctable on appeal though not raised in the trial court. (*Id.* at pp. 1414–1415.) By

the same reasoning, it is equally unauthorized to impose a laboratory fee without a statutory basis. This contention is different from the ability to pay findings that are forfeited under the reasoning of *People v. Trujillo* (2015) 60 Cal.4th 850 and *People v. Aguilar* (2015) 60 Cal.4th 862.

III. DISPOSITION

We order modification of the probation conditions to state that defendant shall "not possess any item that you know under the law would be considered a deadly or dangerous weapon during the period of probation." We strike the order imposing a criminal laboratory analysis fee of $50 under Health and Safety Code section 11372.5 and the related penalty assessments of $155. The trial court is directed to prepare a corrected minute order. As so modified, the judgment is affirmed.

SEE CONCURRING OPINION

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Grover, J.

I CONCUR:

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Márquez, J.

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RUSHING, P.J., Concurring

I concur in judgment; however, I would modify the probation condition regarding alcohol and illegal, controlled substances to add a knowledge requirement. Absent a requirement that defendant know he is disobeying the condition, he is vulnerable, and unfairly so, to punishment for unwitting violations of it. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629.) From a practical standpoint, there are many drinks that are made to look innocent. Examples abound: lemonade, cider, iced tea, more particularly, "Angry Orchard Hard Cider," and "Mike's Hard Lemonade."

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RUSHING, P.J.

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